

## THE PARLIAMENT CONTROL ON OMBUDSMAN INSTITUTION

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**Abstract:** The Parliamentary control is exerted not only on the Government but also on some autonomous administrative authorities and on some special bodies under its subordination. The constitutional norms are extremely synthetic on this form of parliamentary control, as only the art. 116 par. 2 of the Constitution stipulates that specialised bodies may be established which to function under Government subordination or as autonomous administrative structures, by organic law.

The Ombudsman Institution is an autonomous administrative authority established according to the Constitutional provisions, the activity of which is under Parliament control.

For the first time, the Ombudsman has been established in Sweden as additional tool to the control exerted by the Parliament on the executive power. Additional guarantees were enforced by it, as being an institution with democratic character, for the defence of the rule of law and for the protection of the individual rights and freedoms.

On the Ombudsman's appointment and role, the article 58 of the 1991 Romanian Constitution stipulates that the person in charge is to be appointed by the Chamber of Deputies and the Senate in joint meeting, its appointment being of five years and that the Ombudsman cannot have another civil or private service except for the teaching positions in higher education.

**Keywords:** ombudsman, ombudsman institution, parliamentary control, report.

### 1. General Consideration on the Autonomous Administrative Authorities under Parliamentary Control

The autonomous authorities of the State public administration find their regulating provisions in the art. 117 par. (3) of the Romanian Constitution, stipulating the possibility to establish such bodies through an organic law. The provisions of the Fundamental Law refer precisely to the establishment of some autonomous administrative authorities such as: the Ombudsman, the Legislative Council, the Courts of Accounts, the National Audio-visual Council, and the Supreme Council for Country Defence, the Romanian Intelligence Service. It may be noticed that the autonomous administrative authorities may have a constitutions or a legal status.

These public authorities have a specific status differentiating them from ministries or from the other central specialised bodies under Government subordination. Thus, the organisation and functioning of these public autonomous authorities is regulated by organic law.

Some of these public autonomous central authorities being established by Constitution may be cancelled only by a constitutional law cancelling the constitutional provisions enforcing them, while the other autonomous public authorities may be established only by organic law, unlike the setting up of ministries or other central specialised bodies under Government subordination which can be performed by law according to the constitutional norms and if the act is endorsed by the Court of Accounts[1].

These administrative authorities' main characteristic is given by the fact that they are not under Government or other public authorities' subordination, the autonomy excluding any kind of subordination. These authorities are organized and develop their activity like the other central public administration bodies, the difference being that they function independently and do not have upper hierarchic bodies [2]. There are fundamental differences between the autonomous authorities of the State public administration having constitutional status and those established by organic law according to the Constitutional provisions, mainly regarding the level of dependency towards the Government. Thus, the autonomous authorities of the Constitution are subordinated to the Government only in the measure how the latter issues ordinances or normative decisions under the incidence of which this law subject fall in. As for the rest of the autonomous public authorities, the Constitutional rule according to which the Government is the general leader of the public administration has a wider level of extension. For the public authorities established by organic law, the activity they perform is achieved according to the Governmental activity for the respective field, exerting legal attributions of complementarity with the Government, but without being able to substitute it in their activity and without being able to decide while ignoring what the Government has established for the respective field. Specifically, these public authorities, while carrying on their activity, cannot make abstraction of the governmental program agreed by the Parliament and based on which the Government exerts its role established by the art. 102 par. (1) of the Constitution. Therefore, in achieving the attributions set by law, these autonomous authorities must act within the limits set by the Government by ordinances or decisions regulating the performance of these public services. These public authorities are not subject to the administrative tutelage, but, also, they are not allowed to act in contradiction with the decisions or ordinances issued by the Government [3].

These public autonomous authorities are not dependent on the Government or on a certain ministry, but they enjoy a certain dependency only to the Parliament. This

dependency concretise by the appointment of their leading bodies and by the parliamentary control which the Parliament exert on them [4].

The Parliament is assigning the management of these autonomous central public authorities, a part or all of those forming them, where applicable [5]. The management of these autonomous administrative bodies is approved by both Chambers of the Parliament or only by one of them based on propositions coming from inside or outside of it, and the leadership may be collegial or assigned to one person.

The parliamentary control on these autonomous public authorities is generally performed by: submission of some annual report or upon Parliamentary request, whenever necessary, on the developed activity; demand for information or documents from these public authorities; the establishment of some standing parliamentary commissions which exert the parliamentary control in the same time or by establishing investigations commissions in this regard; the persons' hearing who might deliver information on the activities carried on by these public authorities; submission in the Chambers plenary sessions for debates and deliberation of the matters which are subject of the parliamentary control exerted by commissions; the exercise of the financial control; etc.

The parliamentary control concerns both the autonomous public authorities established by Constitution, and those established by organic law.

The autonomous administrative bodies, established by Constitution and under parliamentary control, are: the Supreme Council for Country Defence, the Legislative Council, the Ombudsman, the Court of Account, and the Economic and Social Council [6].

The constitutional norms are extremely succinct on the parliamentary control exerted on some autonomous administrative authorities and on some special bodies under Government subordination as only the art. 116 par. (2) of the Constitution stipulates that there may be established specialised bodies which could function under Government subordination or as autonomous administrative structures, established by organic law.

The existence of these independent administrative bodies circumscribe to the current general tendency of the constitutional democracies of increasing, at central level, the number of independent administrative authorities, autonomous to the executive power or only to the Government.

These autonomous administrative authorities do not subordinate hierarchically to the Government, but they are in certain relation with the Parliament, either by Parliamentary appointment of the leadership or by these bodies obligation to submit reports to the Parliament. These autonomous administrative authorities' liability in front of the Parliament is much diminished compared to the Government liability in front of the same institution. Some autonomous administrative

authorities are analysed distinctly in the Constitution text (the Supreme Council for Country Defence), others are only mentioned (the intelligence services), and others are not even provided there (the National Bank of Romania, The National Audio-Visual Council).

We consider that a future constitutional regulation should specifically list in the Constitution the autonomous administrative authorities of national importance and there should be specified the special procedure for establishing some new one or for their annulment. In addition, there should be instituted by the Constitutional norms the obligation for such autonomous administrative bodies to submit annually to the Parliament a report on the developed activity. Currently, only the Supreme Council for Country Defence is obligated by the art. 65 par. (2) letter "g" of the Constitution to submit such a report to the Parliament.

Lately, the excessive growth in the number of specialised bodies subordinated to the Government led to the exclusion of an important activity of the Government from the parliamentary control. Under such terms, the rule on Government liability to the Parliament stipulated in art 109 of the Constitution became more and more distant in the practice by the lack of defining a relation between these specialised bodies and the Parliament. We believe that a future constitutional regulation should comprise the obligation for these specialised bodies subordinated to the Government to submit reports on the developed activity to the specialised parliamentary commissions, depending on their object of regulation. The current legislative framework provides that these autonomous administrative authorities or specialised bodies subordinated to the Government may issue dispositions, instructions and "other normative acts" which are published in the Official Journal of Romania, according to the Law no 24/2000. We believe that a further Constitutional regulation should list exhaustively the titles of the acts issued by these autonomous administrative authorities subordinated to the Government, together with the rule of their publication in the Official Journal of Romania.

## **2. The Parliamentary Control Exerted through the Ombudsman**

One of the oldest institution by which the Parliament controls the activity of the public administration is the Ombudsman, established in Sweden in 1766, as trustee of the legal power to inquire the king's subjects' complaints against illegal acts issued by the royal administration [7].

The Ombudsman is an independent person, appointed either by the Parliament or by the Executive to defend the citizens' rights and freedoms in relation with the public authorities and especially with the executive ones [8].

This institution extended quickly especially in Europe, carrying various names such as: parliamentary commissioner, people's defender (Spain), public defender;

public mediator, provedor de justícia (Portugal), Republic mediator – médiateur de la République (France), ombudsman; parliamentary prosecutor.

As institution, the Ombudsman is a public service with the main task of investigating the government measures as reply from the complaints submitted by the members of the society [9].

A modern Parliament duties and responsibilities are so many, and the proper solving of the complaints requires such high qualifications and attention that it is necessary to set up also a separate institution – the Ombudsman – so that the Parliament is partially released from this task.

The Ombudsman reports to the Parliament, meaning that the institution does not undermine Parliamentary responsibility of controlling the executive [10].

Furthermore, the Ombudsman's existence does not affect in any way the direct contact between the citizens and the Parliament members, nor does prevent them from actively participating in solving the matters confined to them by their own electors.

The Ombudsman is an institution recognised by the Constitution or by a law passed by the legislative body, run by an independent person liable for own actions in front of the Parliament. It receives citizens' complaints and act on its own initiative to defend the lawfulness of the juridical or administrative papers, making recommendations or suggestions and publishing annual information [11].

The institution knows two forms of manifestation: the Ombudsman with general competency, and the Ombudsman with special competency. The Ombudsman with general competency receives all citizens' complaints on the administration excesses and abuses, having the competency to perform inquiries and to intervene by the Government, while the Ombudsman with special competency controls only certain public services.

There are in some European States besides the Ombudsmen with general competency, also ombudsmen (mediators, parliamentary commissioners etc.) specialised on fields of activity such as: consumer's protection, children's rights, protection of the persons with disabilities, media, army, pensions etc. There are also States where, besides the national Ombudsman, there are local ones (Netherlands). In addition, there is also a European Ombudsman appointed by the European Parliament [12].

The 1991 Constitution of Romania introduced for the first time in country history, the Ombudsman's Institution under the name of People's Solicitor. Thus, according to art 58 of the fundamental law, the Ombudsman is appointed in joint session of the Chamber of Deputies and Senate for five years, in order to defend the physical persons' rights and freedoms.

In the idea of providing increased efficiency to the institution activity and to achieve a better correlation with the regulations from other countries where

Ombudsman is organised and functioning, on the revision of the Constitution, a new provision was added in the way that, in the exercise of its attributions, the Ombudsman shall have specialised deputies on fields of activity. The Ombudsman's deputies are appointed by the Standing Offices of the Chamber of Deputies and Senate, upon Ombudsman's proposition, and endorsed by the Legal Commissions of the two Parliament Chambers [13].

Starting from the legal regulation of the Ombudsman's Institutes shaped by the Constitution, as well as from the law on the Ombudsman's organisation and functioning, we can find out that the Ombudsman's institution is an autonomous and independent public authority towards any other public authority. While exerting its attributions, the Ombudsman does not substitute itself to the public authorities, and it cannot be forced to submit to the instructions or dispositions received from any other public authority.

Placing the Ombudsman's institution in the title on the fundamental rights, freedoms and duties confers this institution with particular juridical features in the meaning that: it is a public autonomous and independent authority towards any other public authority, it does not substitute itself to other public authorities; it has its own budget which is part of the State budget; the Ombudsman's position is assimilated to that of minister, the position of Ombudsman's deputy is assimilated to that of Secretary of State, and the leading and executive, and specialised positions are assimilated to those from the parliamentary services.

Thus, the Ombudsman appears as an institution by which the Parliament controls and ensures the compliance with the physical person's rights and freedoms in their relations with the public authorities. Consequently, the Ombudsman exerts *ex officio* its attributions or by demand from the persons injured by the violation of their rights and freedoms from the authorities of the public administration and decides upon such claims. Any claim may be addressed by any physical person, without taking into account the citizenship, age, gender, political or religious beliefs.

From interpreting these legal texts, it may result the idea that any physical person whose fundamental rights and freedoms have been violated by the public administration authorities may address to the Ombudsman.

There cannot be subject of the Ombudsman's activity and there are to be rejected without justification the claims on the acts issued by the Chamber of Deputies, Senate or Parliament, the deputies' and senators' acts and deeds, those of the Romanian President and Government, as well as those of the Constitutional Court, of the Legislative Council president, and of the judicial authority. From the above, it results that the law-making power, the executive and judicial ones are exempted from the control exerted by the Ombudsman, traditionally, its activity being in the scope of the public administration.



The Ombudsman, upon receiving the claims, will dispose their examining by the specialised staff and, if a violation of the physical person's rights by administrative acts or deeds of the public administration authorities is found, it will inform the authority of the public administration on their illegality. Like for the law of the administrative contentious, the Romanian law-maker assimilated the illegal administrative acts also the silence from the public administration bodies and the delayed issuing of the acts, in the measure how such administrative juridical deeds violate the citizen's rights.

The notification of the public administration authorities is made by recommendations, specific juridical acts for the Ombudsman, via which it informs the issuing body on the performed illegalities, on the damages incurred to the petitioner, and the claim to eliminate the found illegalities. These acts issued by the Ombudsman are not submitted to the Parliamentary or judicial control, as they represent simple acts of notification of the public administration. The Ombudsman's claim, addressed to the public authority, is to aim for the reforming or revoking of the administrative act and the compensation for the incurred damage, as well as the placing of the harmed person in the previous situation.

The public authorities notified by the Ombudsman are to take the necessary measures for removing the found illegalities, to compensate for the damages and to remove the causes generating or favouring the violation of the harmed person's rights as soon as possible and they are to inform the Ombudsman upon this.

When the public administration authorities or the civil servant employed by such an authority did not comply with the Ombudsman's recommendations, within 30 days since the date of the notification of the performed illegalities, the Ombudsman is to address to the higher public administration which have to communicate it within at most 45 days, the measures which were taken.

If the central public administration authorities or the prefect did not take the necessary measures for removing the illegalities, the Ombudsman is entitled to notify the Government on any illegal administrative act or deed performed by the central public administration or by the prefect.

If the Government does not adopt measures on the illegality of the administrative acts or deeds signalled by the Ombudsman within 20 days, this is to be informed to the Parliament.

While exerting its attributions, the Ombudsman is entitled to perform its own investigations, to ask the authorities of the public administration for any information and documents required for the investigation, to hear and take statements from the management of the authorities of the public administration and from any civil servant who may provide the necessary information for solving the claim. In this regard, according to the law, the Ombudsman has access also to classified information held by the public authorities, in the measure how such

information it considers as required for solving the claims addressed to it, however being obliged not to divulge or make public the secret information or documents that he was provided access to. This obligation stands even after the termination of its activity as Ombudsman and also applies on its deputies and on the staff under its services, being subjects to sanctions provided by the criminal law.

The Ombudsman has the duty to inform the person sending the claim on the results of its activity. The communication is confidential and may be publicised only with the interested person or persons' consent.

The Ombudsman activity is presented to the two Chambers of the Parliament through some annual reports or at shorter delays if the Parliament asks for. The reports submitted to the Parliament may comprise recommendations on the legislation or other measures of other nature in order to protect the citizens' rights and freedoms.

The exercise of the parliamentary control on the public administration through the Ombudsman supposes to provide a genuine independence to this institution. As body called to help the Parliament in achieving its attribution of control of the public administration, the Ombudsman has by law a special status, likely to that of the Members of the Parliament [14]. Precisely for this reason, the law of organization and functioning of this institution stipulates that the Ombudsman cannot be subject to any imperative or representative mandate and that no one can force the Ombudsman to submit to its instructions or dispositions. In the same frame of protection of the institution activity, the Ombudsman and its deputies are not legally liable for the issued opinions or for the acts they are doing, while complying with the law in the exercise of the legal attributions. In order to avoid any abusive judicial actions directed against the Ombudsman or its deputies, they are protected by parliamentary immunity. That is why during the exercise of its mandate, the Ombudsman may be pursued and submitted to criminal judgment for other deeds than those regarding the exercise of the attributions stipulated by law, but it cannot be retained, searched or arrested without the approval of the presidents of the two Chambers of the Parliament. The same level of protection is conferred to its deputies as well, with the mention that they cannot be held, searched or arrested without prior notice to the Ombudsman. Finally, the Ombudsman and its deputies protection goes up to the point where they are forbidden to be members of any political party and to have another private or public position, except for the teaching positions in higher education.

### **3. The Parliamentary Control Exerted on the Institution of the Ombudsman**

The Ombudsman's activity is carried on under Parliamentary control, with the obligation of submitting reports to the legislative for [15].



The relations between the Ombudsman and the Parliament are defined by the article 60 of the Romanian Constitution. This article stipulated the obligation for the Ombudsman to submit, annually or at Parliament's request, some reports on the legislation or on taking other type of measures for the protection of the fundamental rights and freedoms [16].

The report is the act nominated by the constitutional dispositions. These establish the existence of two categories of reports: the annual report and the report submitted upon Chambers demand.

The annual report submitted to the Parliament is an extremely important element in the control of the Ombudsman's activity as it provides the possibility for triggering some debates on the functioning of this institution and on the advances it made, as well as on revealing those areas of the society, those administrative activities where problems occur. The annual report is a statement on the institution activity during one year and it must comprise an exigent analysis on this institution activity.

The Ombudsman's reports produce both juridical and political effects. These effects are expressed by the juridical applicable treatment. Thus, the Ombudsman's annual report must have the contents stipulated by the Constitution, allowing the Parliament to control the institution activity [17].

The reports may also comprise recommendations for legislation changing or for other type of measure, for preserving the citizens' rights and freedoms. However, the Ombudsman does not have the right for legislative initiative, according to article 74 of the Constitution, so these recommendations could concretise in a draft bill only if one of the initiators stipulated by the Constitution is to exercise its right for legislative initiative in this regard.

In the hypothesis when the Ombudsman considers necessary to modify an existing law or to initiate a draft bill, it will have to appeal in all situations to the entitled factors, according to the Constitution, to trigger the legislative procedure

As for the expression "measures of other nature" which the Ombudsman may recommend, the generality of the languages used by the Constitutional law-maker allows for the interpretation that, as result of its endeavour, the Parliament may ask for explanations to the Government on some activities of these departments which caused citizens' discontent.

The Ombudsman may recommend the Members of the Parliament to issue some questions, interpellations or motions which parliamentary procedures for providing the Parliament control on the Government.

The annual report concerns the institution activity during one calendar year and it is submitted to the Parliament until February 1<sup>st</sup> the following year in order to debate it in joint session of the two Chambers of the Parliament. The annual Report is published.

If the report is requested by one of the Parliament Chambers or by both Chambers, it is imperiously necessary the report topic to be mentioned, but the possibility for asking for an analysis report for a shorter timeframe is not excluded.

The Ombudsman's reports are examined by the standing commission assigned by the Standing Offices of the two Parliament Chambers and then, they are submitted to debate in the joint session of the Chamber of Deputies and Senate. The debates are followed by a vote in the Parliament to approve or reject these reports. Of course, these reports are published upon Parliament Chambers request. The Ombudsman has to submit reports on various issued, reports which are registered in the institution practice as special reports.

The Ombudsman may submit such reports to the Parliament by its own initiative. The practice has shown that such special reports have been drafted and submitted both to the Parliament, and to the Government. In this regard, the art 26 par (2) of the Law 37/1997 on the organization and functioning of the Ombudsman stipulates that, in the situation when the Ombudsman finds out, while performing investigations, lacunas in the legislation or serious corruption cases or situations of violation of the country law, it is to submit a report, comprising its findings, to the presidents of the two Parliament Chambers or, where applicable, to the Prime Minister.

Actually, the special report represents a notification addressed to the Parliament and to the Government, eventually. The report is to be debated in the Parliament, but the most efficient practice would consist in discussing the report in the competent standing commissions, with the participation of the involved public authorities [18].

### Conclusions

The Ombudsman's organization and functioning are established by organic law, the Ombudsman's, its deputies' and staff working under their authority activity having a public character. Starting from the legal regulation of the Ombudsman's institution as crayoned in the Constitution and as stipulated in the law for organization and functioning of the Ombudsman institution, we may find out that the Ombudsman's institution is an autonomous public authority, independent to any other public authority, under Parliament control. In the exercise of its attribution, the Ombudsman does not substitute to the public authorities, nor can it be forced to submit to the instructions or disposition received from any other public authority. In addition, the Ombudsman does not substitute itself to the public authorities, the latter being obliged to communicate or, where applicable, to submit to it, according to the law, the information, documents or acts which they have regarding the claims addressed to the Ombudsman, supporting it in the exercise of its attributions.

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## Notes

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- [2] V. Prisăcaru, *Tratat de drept administrativ român. Partea generală*, ediția a 3-a, Editura Lumina Lex, București, 2002p. 191.
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- [5] D. Apostol-Tofan, *Drept administrativ*, vol. I, ediția a 2-a, Editura C.H. Beck, București, 2008, p. 245.
- [6] The autonomous administrative authorities under Parliamentary control have been established by organic laws; the Council for Competitiveness, the National Commission of

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Fix Assets, the National Bank of Romania, the Romanian Intelligence Service, the Foreign Intelligence Service, the Service for Protection and Guard, the Special Telecommunications Service, the Council of the Commission for Insurances Supervision, the Romanian Broadcasting Company, the Romanian Television Company, the National College for Studying the Security Archives, the Commission for Supervision of the Private Pensions System, the National Council for Fight against Discrimination, which are under Parliament control.

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[13] The Law no. 35/1997 establishes in art. 10 the following specialization fields: human rights, equality of chances between men and women, religious cults and national minorities; children's, family, youth, retired persons, disabled persons' rights; army, justice, police, penitentiaries; ownership, labour, social protection, taxes and fees (*the Law no. 35 of 1997 for the organization and functioning of the Ombudsman's institution* was initially published in the Official Journal of Romania, part I, no. 48 of March 20, 1997 and it was republished in the Off. J. of Romania, part I, no. 844 of September 15, 2004).

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